

This Opinion is Not a
Precedent of the TTAB

Mailed: May 1, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Buzz Bar LLC

Serial No. 90358149

Joseph R. Cruse, Jr. of the Law Office of JR Cruse,
for Buzz Bar LLC.

Drew Ciurpita, Trademark Examining Attorney, Law Office 114,
Nicole Nguyen, Managing Attorney.

Before Taylor, Wellington and Heasley,
Administrative Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

Buzz Bar LLC (“Applicant”) seeks registration on the Principal Register of the standard character mark MAJESTIC MANGO (with MANGO disclaimed) for “Ice cream infused with alcohol; Sorbet infused with alcohol,” in International Class 30.¹

The Trademark Examining Attorney has refused registration of Applicant’s mark under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on the ground that

¹ Application Serial No. 90358149 was filed on December 3, 2020, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), and is based upon Applicant’s claim of first use of the mark anywhere on May 13, 2014 and in commerce on November 17, 2015.

Applicant's mark, when used in connection with the identified goods, so resembles the standard character mark in Registration No. 5831791, MAJESTIC SHAKES (with SHAKES disclaimed), for "Frozen confections; ice cream products, namely, ice cream and ice cream drinks," in Class 30,² as to be likely to cause confusion, mistake or deception.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal resumed and is fully briefed. For the reasons stated below, we affirm.

I. Applicable Law

Section 2(d) of the Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion, mistake, or deception. 15 U.S.C. § 1052(d). Our determination of likelihood of confusion under Section 2(d) is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*DuPont*"). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). We discuss below these and other relevant factors.

² Registration No. 5831791 was issued on August 13, 2019.

See In re Guild Mortg. Co., 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019) (Board considers each *DuPont* factor for which there is evidence and argument).

II. Similarity of the Goods, Channels of Trade and Classes of Consumers

We begin our analysis with the second *DuPont* factor, which “considers whether ‘the consuming public may perceive [the respective goods] as related enough to cause confusion about the source or origin of the goods ...’” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1086 (Fed. Cir. 2014). In making our determination regarding the relatedness of the goods, we must look to the goods as identified in Applicant’s application and the cited registration. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.”)); *see also In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011).

Registrant’s broadly worded recitation of “frozen confections; ice cream products, namely, ice cream” encompasses Applicant’s more narrowly identified “ice cream infused with alcohol; sorbet infused with alcohol.” *See e.g., In re Country Oven, Inc.*, 2019 USPQ2d 443903, *4 (TTAB 2019) (quoting *Sw. Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015) (“[w]here the identification of services is broad,

the Board ‘presume[s] that the services encompass all services of the type identified”’); *In re Solid State Design Inc.*, 125 USPQ2d 1409, 1413-14 (TTAB 2018) (where the goods in an application or registration are broadly described, they are deemed to encompass all the goods of the nature and type described therein). Thus, on the face of the respective identifications, the goods are legally identical.

In addition to the presumption that the goods are legally identical, the Examining Attorney submitted copies of webpages from eleven websites, i.e., Jeni’s, Ben & Jerry’s, Mercer’s Wine Ice Cream, Ice Cream Jubilee, New Orleans Ice Cream Co., Browndog Barlow & Restaurant, Haagen-Dazs,³ Van Leeuwen, Purple Door Ice Cream, Humphry Slocombe and Buzzed Bull Creamery,⁴ showing that ice cream and sorbet infused with alcohol like those identified in Applicant’s application are often provided by the same entities that also provide non-alcoholic frozen confections and ice cream like those identified in the cited mark under the same mark.

Although Applicant’s main brief is silent on this issue, Applicant, in its reply brief, questions both the legal presumptions and the probative value of this third-party use evidence. Applicant essentially argues that although the third-parties include both ice cream and ice cream infused with alcohol, Registrant’s goods do not include those “infused with alcohol.” Therefore, Applicant urges that “[Registrant,] having chosen industry terms to delimit its goods, ... should be bound by the actual meaning of those terms within its industry.... Granting broad rights to registrant ... would give

³ See December 9, 2021, Final Office Action; TSDR 6-41.

⁴ See July 7, 2022, Denial of Request for Reconsideration; TSDR 5-24.

registrant an overbroad extension of its goods and monopoly beyond its current scope.”⁵ There are several problems with this argument. First, Registrant did not restrict its goods to those that have not been infused by alcohol. As stated, Registrant’s broadly-worded frozen confections and ice cream must be deemed to encompass all the goods of the nature and type described therein, which the record shows could include both non-alcoholic and alcohol-infused varieties. See *In re Country Oven, Inc.*, 2019 USPQ 443903, at *4. Thus, the goods are legally identical.

Second, the fact that the respective goods are legally identical means that we must also presume that the relevant purchasers and channels of trade are identical to the same extent. See *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (“With respect to similarity of the established trade channels through which the goods reach customers, the TTAB properly followed our case law and ‘presume[d] that the identical goods move in the same channels of trade and are available to the same classes of customers for such goods’”) (citing *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012)); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same.). Even in the absence of these presumptions, Applicant’s arguments are unpersuasive. While Applicant’s goods may not be sold to purchasers under 21 years of age, there is nothing to prevent those over 21 from purchasing both Applicant’s and

⁵ Applicant’s Reply brief. 11 TTABVUE 6.

Registrant's respective ice cream and/or frozen confections in, as the record reflects, some of the same channels, such as grocery stores and ice cream shops. As such, the respective trade channels and classes of consumers would, at a minimum, overlap.

As regards the third-party use evidence, evidence of relatedness may include news articles or evidence from computer databases showing that the relevant goods are advertised together or sold by the same manufacturer under the same mark. *See, e.g., In re Detroit Athletic Co*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018) (relatedness supported by evidence that third parties sell both types of goods under same mark, showing that "consumers are accustomed to seeing a single mark associated with a source that sells both."); *In re Embiid*, 2021 USPQ2d 577, at *22-23 (TTAB 2021) (citing *In re Ox Paperboard*, 2020 USPQ2d 10878, at *5 (TTAB 2020); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *In re Anderson*, 101 USPQ2d 1912, 1920 (TTAB 2012) (Internet excerpts from "several third-party car dealerships offering 'tires' for sale on their websites" was "evidence that consumers expect to find both 'tires,' . . . "and 'automobiles' . . . emanating from a common source.").

Moreover, for goods to be related, it is not necessary that Applicant and Registrant be direct competitors; rather, they need only be producing goods that are related from the point of view of consumers of the respective goods. *Dan Robbins & Assocs. v. Questor Corp.*, 599 F.2d 1009, 202 USPQ 100, 104 (CCPA 1979) ("The marks need not be used on directly competing goods, any relation likely to lead purchasers into assuming a common source being sufficient."). That is, separately marketed goods

could be encountered by the same consumer under situations that would lead to the mistaken belief that they originate from the same source. *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1723 (Fed. Cir. 2012). Here, we find the Examining Attorney's third-party use evidence sufficient to corroborate the presumptions that the goods are related by showing that consumers are likely to believe that Applicant's ice cream and sorbet infused with alcohol are related to Registrant's frozen confections and ice cream, because such goods are often sold by the same third-party sources under the same marks.

Accordingly, the *DuPont* factors concerning the similarity of the goods, channels of trade and classes of purchasers weigh heavily in favor of a finding of likelihood of confusion.

III. The Marks

We next address the *DuPont* likelihood of confusion factor focusing on "the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression." *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (citing *DuPont*, 177 USPQ at 567). "The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties." *Coach Servs.*, 101 USPQ2d at 1721.

Because this factor is based on the marks in their entireties, our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); *see also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). Even so, there is nothing improper in assigning more or less weight to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *Nat'l Data*, 224 USPQ at 751.

We compare Applicant’s MAJESTIC MANGO mark with the cited registered MAJESTIC SHAKES mark in their entireties, and find them similar as a result of the common word, MAJESTIC, which dominates both marks. We are not persuaded by Applicant’s argument that the additions of the word MANGO to its mark and SHAKES to the cited mark renders them sufficiently dissimilar in overall commercial impression as to weigh against a finding of likelihood of confusion. Instead, we find that the word MANGO in Applicant’s mark has little to no source-indicating significance as it is merely descriptive of a feature of Applicant’s goods and has been disclaimed. Similarly, as Applicant points out, the disclaimed word SHAKES in the cited mark presumably is merely descriptive (if not generic) of some of Registrant’s goods. Shakes, a common shortened form of the plural milkshakes,⁶ are often made

⁶ We take judicial notice of the definitions taken from MERRIAM-WEBSTER Dictionary (online version) of “milkshake,” as “a thoroughly shaken or blended drink made of milk, a flavoring

with ice cream, and may be considered a frozen confection. We thus find it also has little to no source-identifying significance. As such, the words MANGO and SHAKE are entitled to less weight in our determination. *See In re Charger Ventures LLC*, ___ F.4th ___, 2023 USPQ2d 451, at *5 (Fed. Cir. 2023) ([“W]hile the Board must consider the disclaimed term, an additional word or component may technically differentiate

syrup, and often ice cream,” and “shake” which is defined as “MILKSHAKE.” Both definitions were retrieved on April 28, 2023. The Board may take judicial notice of dictionary definitions, including online dictionaries which exist in printed format. *See In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *In re CyberFinancial.Net Inc.*, 65 USPQ2d 1789, 1791 n.3 (TTAB 2002). *See also* Applicant’s November 24, 2021 Response; TSDR 7-24 (Synonyms for the word “milkshake” that include the word “shake” and webpages from aol.com featuring promotions from Burger King, showing use of the word “Shake” to identify frozen confections).

Applicant also made of record a list of applications and registrations taken from the Trademark Electronic Search System (TESS) for marks containing the word “SHAKE” to further demonstrate the generic nature of the word (*id.* at TSDR 25-26). However, the mere submission of a list of applications and registrations does not make such applications and registrations part of the record. *See In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1405 n.17 (TTAB 2018) (citing *In re 1st USA Realty Prof’ls*, 84 USPQ2d 1581, 1583 (TTAB 2007)). Also, third-party applications are evidence only of the fact that they have been filed, *Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at *26 (TTAB [*6] 2022) (“Applicant’s proofs that we totally disregard include a significant number of pending ... trademark applications”) (citing *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1270 n.8 (TTAB 2009)), and have no other probative value, *Interpayment Servs. Ltd. v. Docters & Thiede*, 66 USPQ2d 1463, 1468 n.6 (TTAB 2003). Here, the mere listing of registrations, which have not been made of record and that do not recite the goods or services for which the marks were registered, have no persuasive value. *See In re Hoefflin*, 97 USPQ2d 1174, 1173 (TTAB 2010).

Applicant also made of record, with its November 24, 2021 Response (at TSDR 27-28) and again with its Request for Reconsideration (at TSDR 9-10), a TESS listing of applications and registrations for marks containing the wording “MAJESTIC” to support the argument that the word MAJESTIC is weak, diluted, or so widely used that it should not be afforded a broad scope of protection. However, as the Examining Attorney informed Applicant in both the Final Office Action and Denial of Applicant’s Request for Reconsideration, and as just stated, the mere submission of a list of applications and registrations does not make them part of the record. *See In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1405 n.17 (TTAB 2018) (citing *In re 1st USA Realty Prof’ls*, 84 USPQ2d 1581, 1583 (TTAB 2007)). Consequently, there is no evidence of record of any weakness of the term MAJESTIC.

a mark but do little to alleviate confusion.”); *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004) (descriptive terms are properly given less weight). While Applicant is correct to emphasize that likelihood of confusion cannot be predicated on the dissection of a mark, and that disclaimed matter must also be evaluated in considering the marks, the Examining Attorney did not dissect the marks in his analysis or ignore the disclaimed matter. Rather, the Examining Attorney properly analyzed the marks by comparing them in their entireties, recognizing that the most dominant and memorable portion of both marks and the portion with the greatest potential source-indicating impact is the word MAJESTIC.

Moreover, the significance of the word MAJESTIC as the dominant and memorable portion of each mark is further reinforced by its position as the first word in the respective marks. *See Presto Products, Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”). *See also Palm Bay Imps. Inc.*, 73 USPQ2d at 1692 (“Veuve” is the most prominent part of the mark VEUVE CLICQUOT because “veuve” is the first word in the mark and the first word to appear on the label); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers will first notice the identical lead word). The peripheral differences here are descriptive and latter terms and, as noted, fail to distinguish the marks.

Regarding connotation and commercial impression, while Applicant is correct in that the connotation of the marks is tied to the identified goods, the word MAJESTIC

has the same meaning in both marks of being “impressive,”⁷ as the goods are legally identical. The addition of the descriptive word MANGO to Applicant’s mark and SHAKES to Registrant’s mark does not significantly change the overall commercial impressions imparted by the marks MAGESTIC MANGO and MAJECTIC SHAKES in their entireties.

We keep in mind that where, as here, the goods are legally identical, the degree of similarity between the marks necessary to support a determination that confusion is likely declines. *In re Viterra*, 101 USPQ2d at 1908. While differences exist between the respective marks, we find that in their entireties, the marks are more similar than dissimilar in appearance, sound and connotation and convey substantially similar commercial impressions due to the shared term MAJESTIC. Consumers viewing the respective marks at different times are most likely to notice and remember this common dominant term. *See, e.g., Spoons Rests. Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff’d mem.*, 972 F.2d 1353 (Fed. Cir. 1992) (The fallibility of human memory is a factor when comparing marks, given that a side-by-side comparison is not the ordinary way that a prospective consumer would be exposed to marks.).

The *DuPont* factor of the similarity of the marks thus weighs in favor of a finding of likelihood of confusion.

⁷ The pertinent definition of “Majestic,” of which we take judicial notice, is in THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE as “Impressive” (last visited April 28, 2023).

IV. Consumer Sophistication and Purchaser Care

Turning to the fourth *DuPont* factor, the “conditions under which and buyers to whom sales are made, i.e. ‘impulse’ vs. careful, sophisticated purchasing,” *DuPont*, 177 USPQ at 567, Applicant explains that its “ice creams and sorbets infused with alcohol are designed to be adult products that are specifically, and legally restricted, to be marketed to adults over the age of twenty-one.” Applicant’s brief, p. 9.⁸ Applicant then argues, without support, that these adult consumers seek out and purchase this specifically tailored desert for the alcohol content, and therefore exercise care in purchasing Applicant’s alcohol infused ice creams and sorbets, which care is heightened by age restrictions. *Id.*⁹

While Applicant’s products contain alcohol and presumably must be purchased by consumers over the age of twenty-one, we have no reason to conclude that such an age restriction has any effect on the degree of care exercised by consumers in their selection of ice cream or sorbet infused with alcohol. Instead, the record shows that alcohol-infused ice cream and sorbet (as well as non-alcoholic versions) are ordinary consumer products sold at modest price points, e.g., \$2.75-7.25 with an additional \$.75 for “boozy flavors.”¹⁰ As such, the record does not support an elevated degree of consumer care. In fact, customers of such relatively low-cost items exercise a lesser

⁸ 8 TTABVUE 12.

⁹ 8 TTABVUE 12.

¹⁰ December 9, 2021, Final Office Action; TSDR 32. *See generally* December 9, 2021 Office Action; TSDR 6-31 and 33-41, and July 7, 2022, Denial of Request for Reconsideration; TSDR 5-24.

standard of purchasing care and, thus, are more likely to be confused as to the source of the goods. *See Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 223 USPQ 1281, 1282 (Fed. Cir. 1984) (when both products are relatively inexpensive comestible goods subject to frequent replacement, purchasers of such products have been held to a lesser standard of purchasing care).

Accordingly, this *DuPont* factor also weighs in favor of a finding of likelihood of confusion.

V. Conclusion

When we consider all of the arguments and evidence relating to the relevant likelihood of confusion factors, we find Applicant's mark MAJESTIC MANGO for "Ice cream infused with alcohol; Sorbet infused with alcohol" and the cited mark MAJESTIC SHAKES for "Frozen confections; ice cream products, namely, ice cream" to be confusingly similar. We find so because, as discussed above, all of the relevant factors weigh in favor of likely confusion.

Decision: The refusal to register Applicant's mark MAJESTIC MANGO is affirmed.